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Supreme Court of the United States

October Term, 1945, No. 274.

F. O. ROBERTSON,

Appellant,

against

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

BRIEF OF THE STATE OF NEW YORK
as *Amicus Curiae*

January 4, 1946.

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Supreme Court of the United States

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F. O. ROBERTSON,

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BRIEF OF THE STATE OF NEW YORK as *Amicus Curiae*

Statement

The appellant has appealed to this Court pursuant to the provisions of § 237 (a) of the Judicial Code (28 U. S. C. § 344 [a]), from the affirmance by the Superior Court of the State of California, County of Ventura, of a judgment of the Justice's Court of Ventura Township, entered on September 29, 1944, convicting the appellant of violating certain sections of the California Insurance Code. The judgment of conviction is challenged here on the ground that the statutes upon which it is based are repugnant to the Commerce Clause (Art. 1, § 8) of the Federal Constitution.* After the statement as to jurisdiction had been filed, this Court, on October 8, 1945, noted probable jurisdiction (R. 54).

*In appellant's assignments of error to this Court it was also claimed that the statutes were in conflict with the Fourteenth Amendment (R. 47). But no such contention is made in appellant's opening brief, the asserted invalidity of the statutory provisions being based solely on the Commerce Clause (see Appts. Opening Br. p. 36).

This brief is being filed by the State of New York as *amicus curiae*, in accordance with the provisions of Rule 27 (9) of the Rules of this Court, in support of the constitutionality of the challenged statutes.

The issues involved in this appeal, raising as they do the question of the validity of state regulatory provisions with regard to activities within a state on behalf of foreign insurance companies doing an interstate business, are of utmost importance to the State of New York.

The attack on the California laws is based on wholly unwarranted implications which appellant seeks to draw from the holding in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1944), that the business of insurance constitutes commerce. This attack on state regulatory provisions is not an isolated instance. Since the *South-Eastern* decision suits have arisen in the various states challenging the validity of either regulatory measures or premium tax laws on the basis of the *South-Eastern* holding.*

The State of New York, like California and most other states, has developed through the years a comprehensive

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* See, e. g., *First National Benefit Society* v. *Garrison*, 58 F. Supp. 972 (S. D. Cal. 1945); *Ware* v. *Travelers Ins. Co.*, 150 F. (2d) 463 (C. C. A. 9th 1945); *National Surety Marine Ins. Corp.* v. *Harrington* (pending in United States District Court, Boston, Mass.); *Keehn* v. *Laubach*, 22 N. J. Misc. 380, 39 A. (2d) 75 (1944); *Keehn* v. *Hi-Grade Coal & Fuel Co.*, 23 N. J. Misc. 102, 41 A. (2d) 525 (1945); *Insurance Commissioner of Pennsylvania* v. *Griffiths*, 23 N. J. Misc. 96, 41 A. (2d) 886 (1945); *Mendola* v. *Pineen*, 185 Misc. 540, 57 N. Y. S. (2d) 219 (1945); *State Farm Mutual Automobile Ins. Co.* v. *Duel* (pending in Circuit Court, Dane County, Wisconsin; a prior appeal by the same company was argued in the Supreme Court of the United States, but the interstate commerce question was not decided, 324 U. S. 154 [1945]); *Glass* v. *Prudential*, 246 Ala. 579, 22 So. (2d) 13 (1945); *Glass* v. *Massachusetts Mutual*, 246 Ala. 588, 22 So. (2d) 21 (1945); *In re Insurance Tax Cases*, 160 Kan. 300, 161 P. (2d) 726 (1945); *Prudential* v. *Forbes*, and *Massachusetts Mutual* v. *Forbes* (Circuit Court, Ingham County, Michigan, Nos. 25224 and 25242).

statutory scheme for regulating the insurance business and the activities within the State of persons engaged therein. Very recently certain provisions of the New York Insurance Law (L. 1939 c. 882, §§ 40, 42 and Art. VI, as amended [McKinney's Consolidated Laws of New York, vol. 27]) were attacked in the New York Supreme Court by way of an action for declaratory judgment. The Court, in a well-reasoned opinion, sustained the constitutionality of the challenged provisions and granted the motion of the State Superintendent of Insurance for judgment dismissing the complaint. *Mendola* v. *Dineen*, 185 Misc. 540, 57 N. Y. S. (2d) 219 (1945). No appeal from that determination was taken either to the intermediate or highest appellate court in the State, and that decision is the only judicial pronouncement in the State on the constitutionality of these regulatory statutes in the light of the *South-Eastern* decision. The authoritative declaration by this Court as to the validity of such statutes as are involved in this appeal would do much to settle a troublesome problem which is confronting the Insurance Commissioners of the various states.

Facts

The appellant was convicted on two counts of a criminal complaint charging him (1) with acting as an agent "for a nonadmitted insurer in the transaction of insurance business" in the State of California, in violation of § 703 (a) of the California Insurance Code; and (2) soliciting and selling a policy of insurance without being licensed to act as an insurance agent, broker or solicitor, as required by § 1642 of the same statute (R. 1-2).* Only a person duly licensed as a surplus line broker under

*The relevant statutory provisions are fully set forth in appellee's brief. The references to the California insurance statutes are taken from Deering's California Codes, Insurance Code of the State of California.

chapter 6 of the Code may act for a nonadmitted insurer (§ 1761), and then only when the insurance "can not be procured from a majority of the insurers admitted for the particular class or classes of insurance" (§ 1763).

The testimony, in brief, showed that one A. J. O'Lein, a resident of California, had received some literature from the First National Benefit Society of Phoenix, Arizona, and in response thereto had mailed an inquiry card to the Society. Thereafter, on August 28, 1944, the appellant called at Mr. O'Lein's home and stated that he represented the First National Benefit Society (R. 7, 8). After explaining the terms and benefits of the policy to Mr. O'Lein, he requested the latter to purchase a policy of insurance in that company (R. 8, 20). As a result, the appellant, with Mr. O'Lein's consent, filled out two applications—one for Mr. O'Lein and one for Mrs. O'Lein (R. 17, 20). A check for the sum of $18.00, representing the first quarterly premium on each policy, was thereupon issued by Mr. O'Lein and made payable to the appellant (R. 17, 10). The appellant, in turn, gave Mr. O'Lein receipts for the premiums (R. 11, 17). At a later date two policies of insurance of the First National Benefit Society were received in the mail by the applicants (R. 12, 18). The cancelled check for the premiums, which Mr. O'Lein subsequently received from the bank, showed that it had been cashed by the appellant (Peo. Ex. 2; offered at R. 10, printed at R. 26). The policies of insurance issued to the applicants contained this provision (R. 31, 34):

> "Premiums necessary to maintain this Certificate in force are not fixed amounts and in event of Premium insufficiency may be adjusted, with the written approval of the Corporation Commission, for the purpose of payment of claims and general operating expenses. In the event of any emergency caused by excessive mortality the Corporation may, with the written consent, or at the direction of the Corpora-

tion Commission, levy Assessments on Members to be placed in the Mortuary Fund."

It is apparent from the foregoing that the policies issued herein come within the terms of § 10810 of the California Insurance Code, in that they are "conditioned, not upon fixed payments but upon the collection from time to time of stipulated premiums with provision requiring additional payments from insured members by assessment. * * *." Section 10818 of the Code prohibits the organization in or admission into the State of any company doing any business under an assessment plan, unless such insurer was organized or admitted in the State prior to January 1, 1940. However, any company, foreign or domestic, meeting California standards, may secure a certificate of authority to conduct an insurance business in the State (§ 700). And in so far as life insurance is concerned, both foreign and domestic insurers, be they stock or mutual companies, having a paid-in capital or surplus of at least $200,000, may transact such business in the State (§§ 10510, 36).

It is undisputed that the First National Benefit Society was not authorized to do business in California and that the applicant was not licensed to act as an agent or broker in the State (R. 22).

At the conclusion of the People's case both sides rested, no testimony having been offered on behalf of the appellant. The Trial Justice, sitting in the Justice's Court of Ventura Township, thereupon found the defendant guilty on both counts of the complaint (R. 23). On appeal to the Superior Court of the State of California, Ventura County, the judgment of conviction was affirmed (R. 40).

Opinion of the Superior Court (R. 41-43)

In a memorandum opinion Judge LOUIS C. DRAPEAU of the Superior Court, after a brief review of the undisputed facts, held that the defendant "acted as agent for a non-admitted insurer, without a license, and is clearly guilty of the crimes charged" (R. 42). Referring to the case of *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1944), which appellant urged for the proposition that California had no power to regulate any phase of an interstate insurance business, the Judge said:

> "There is nothing in the case which overrules prior decisions of the Supreme Court, holding state regulation of insurance to be valid (R. 42). * * * all that this important leading case holds is that the federal law applies to interstate insurance, and that state law likewise applies to interstate insurance until the federal government may exercise its power to legislate in that particular field" (R. 43).

He accordingly affirmed the judgment of conviction.

Argument

Upon the foregoing facts, we shall argue as follows:

1. The business of insurance is clothed with a public interest, and is subject to the regulatory police power of the states. As long as Congress does not legislate in that field, state laws, designed for the protection of their residents, may not be invalidated on the ground that interstate commerce is affected.

2. Nothing in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1944), justifies the conclusion that activities of persons within a state, acting on behalf of insurance companies doing an interstate business, may not be subjected to regulation under the state police power; on the contrary, the opinion expressly vouchsafes such right. In any event, Congress, by the enactment in 1945 of Public Law 15, has sanctioned state regulation and completely dispelled any possible basis for appellant's assertions.

POINT I

The business of insurance is clothed with a public interest, and is subject to the regulatory police power of the states. As long as Congress does not legislate in that field, State laws, designed for the protection of their residents, may not be invalidated on the ground that interstate commerce is affected.

A. The business of insurance is affected with a public interest.

The business of insurance is so extensive in scope and so directly affects the security of untold numbers, that its effect on the public welfare is of far-reaching significance. "Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States." *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 540 (1944). It is no longer open to question, therefore, but that the business of insurance is affected with a public interest and as such "is peculiarly subject to supervision and control." *Hartford Accident & Indemnity Co.* v. *Nelson*, 291 U. S. 352, 360 (1934); and see *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, 412, 414, 415 (1914); *Osborn* v. *Ozlin*, 310 U. S. 53, 65, 66 (1940); *National Union Fire Insurance Company* v. *Wanberg*, 260 U. S. 71, 73 (1922); *O'Gorman & Young* v. *Hartford Ins. Co.*, 282 U. S. 251, 257 (1931).

This Court, in *German Alliance Insurance Co.* v. *Lewis*, *supra*, after citing various examples of conditions imposed on insurance companies by state laws, declared (233 U. S. at p. 412):

> "Those regulations exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental

regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis."

The state's supervisory and regulatory power extends to all aspects of the business (see *Osborn* v. *Ozlin*, *supra*, 310 U. S. at p. 66), including the regulation and control of brokers and agents through whom this huge enterprise is carried on. *LaTourette* v. *McMaster*, 248 U. S. 465, 467 (1919).

B. Until Congress occupies the field, state regulatory provisions, enacted in the exercise of the police power, are valid even though interstate commerce is affected.

(1)

The Federal Government at no time has undertaken the control or regulation of the business of insurance. For years the vital problem of supervision and control has been dealt with by the various state legislatures. As a consequence each state has developed over the years a system of regulation designed to safeguard its residents and to make certain that only responsible companies and persons are permitted to engage in the insurance business. In most instances these regulations were applied with equal force both to domestic and foreign insurers. True, these state regulations, as applied to foreign insurance companies doing an interstate business, were sanctioned on the ground that the business of insurance was not commerce, in line with the doctrine first formulated in *Paul* v. *Virginia*, 8 Wall. 168 (1869).* In the face of that controlling

* See, e.g., *Hooper* v. *California*, 155 U. S. 648, 654-655 (1895); *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, 502-504, 510 (1913); *National Union Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71, 75 (1922); *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274, 276-277 (1927).

principle it was unnecessary to predicate these holdings on any ground other than that the business of insurance was not commerce.

But in connection with other cases involving interstate commerce, the Court, during the same period, evolved a guiding principle for testing the constitutionality of state laws which directly affect and, in some instances, even regulate interstate commerce. Succinctly stated, this governing rule is that state police measures with regard to matters of local concern, are valid and controlling even though they affect interstate commerce, until countervailed by Federal legislation operating in the same field. *Parker* v. *Brown*, 317 U. S. 341, 359-360 (1943); *California* v. *Thompson*, 313 U. S. 109, 113-114 (1941); *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209-210, 211 (1944); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 351-352 (1939); *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185 (1938); *Carter* v. *Virginia*, 321 U. S. 131, 135 (1944); *Duckworth* v. *Arkansas*, 314 U. S. 390, 394-395 (1941); *Minnesota Rate Cases*, 230 U. S. 352, 402-403 (1913); cf. *Southern Pacific Co.* v. *Arizona*, 65 Sup. Ct. 1515, 1519 (1945) [not as yet officially reported].

The foregoing principle is forcefully emphasized in *Parker* v. *Brown*, *supra*, 317 U. S. 341. One of the questions there involved was whether the California Prorate Act violated the Commerce Clause. The statute imposed restrictions upon the sale of raisin crops within the State, 95% of which were marketed in interstate commerce. The purpose of the act was to restrict competition so as to maintain prices. In sustaining the validity of the statute even though it had a direct effect on interstate commerce, the Court reaffirmed the rule that (p. 360) "the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken."

Elaborating on this principle, Chief Justice STONE continued (p. 362):

> "When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved."

These regulations, it was pointed out (p. 362), are not to be sustained on the theory of being "indirect" rather than "direct," nor "because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations." "But," the Court added (pp. 362-3) "they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress."

Equally expository of the rule, and of particular pertinence to the issues at bar, is the decision in *California* v. *Thompson*, *supra*, 313 U. S. 109. The question there considered was whether the statutory requirement for a license and bond to act as a transportation agent in California, violated the Commerce Clause when applied to one who negotiates for the interstate transportation of passengers over the public highways of the State. The Court in holding that it did not, stated at the outset (p. 112) that it was concerned only "with the constitutional authority of the state to regulate those who, within the state, aid or participate in a form of interstate commerce over which Congress has not undertaken to exercise its regulatory power." After referring to the residuum of state power still remaining in the states in spite of the Commerce

Clause; and after citing numerous instances where state laws involving some regulation of interstate commerce were sustained, the Court, speaking of the need of regulating the occupation of transportation broker, said (p. 115):

> "Unless some measure of local control is permissible, it must go largely unregulated. In any case, until Congress undertakes its regulation, we can find no adequate basis for saying that the Constitution, interpreted as a working instrument of government, has foreclosed regulation, such as the present, by local authority."

So, too, in the case at bar, we are solely concerned with state power to regulate the activities of a person, who, within the state aids or participates "in a form of interstate commerce over which Congress has not undertaken to exercise its regulatory power" (313 U. S. at p. 112).

Similarly, in *Carter* v. *Virginia, supra,* 321 U. S. 131, the Court sustained a state law which imposed certain requirements, including the posting of a bond, on a carrier seeking to transport liquor through the state in a purely interstate shipment; it was held that irrespective of the Twenty-first Amendment, this police measure, relating to an activity within the state, did not invade the commerce power of Congress (p. 135).

And less than one month prior to the decision in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533 (1944), this Court in *Union Brokerage Co.* v. *Jensen, supra,* 322 U. S. 202, upheld a Minnesota statute which denied to all foreign corporations the right to maintain suit in any state court, unless they had previously obtained a certificate of authority to do business within the State. Mr. Justice FRANKFURTER, after stating that (p. 209) "the Commerce Clause does not cut the States off from all legislative relation to foreign and interstate

commerce," declared (p. 210):

> "Such commerce interpenetrates the States, and no undisputed generality about the freedom of commerce from state encroachment can delimit in advance the interacting areas of state and national power when Congress has not by legislation foreclosed state action. The incidence of the particular state enactment must determine whether it has transgressed the power left to the States to protect their special state interests although it is related to a phase of a more extensive commercial process."

He later added (p. 212):

> "Nor does it [the Commerce Clause] preclude a State from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration."

We submit that the statutes of California here under attack are constitutionally valid within the guiding framework of the principles of the foregoing cases. Certainly if a state may require a license of one engaged as transportation agent for interstate passage of passengers (*California* v. *Thompson*, *supra*, 313 U. S. 109), and the posting of a bond by a carrier for the transport of an interstate shipment of liquor through the state (*Carter* v. *Virginia*, *supra*, 321 U. S. 131), it is not rendered impotent by the Commerce Clause from requiring that an insurance agent be licensed as a preliminary to aiding in the transaction of a contract of insurance in the State. Such requirement does no more than serve to assure that those who, within the state, engage in a business so related to the public welfare, shall be qualified both from the standpoint of character and fitness to engage in that pursuit. As this Court, quoting with approval from the state court decision, said in *LaTourette* v. *McMaster*, *supra*, 248 U. S. at p.

468: "It is important for the protection of the interests of the people of the State that the business should be in the hands of competent and trustworthy persons."

We accordingly find no validity to the argument that the statutory prohibition from acting as an agent for a nonadmitted insurer collides with the Commerce Clause as applied to one representing a company engaged in interstate commerce. In principle this prohibition is no different from the Minnesota statute, sustained in *Union Brokerage Co.* v. *Jensen*, *supra*, 322 U. S. 202, which denied to all foreign corporations the right to sue in State courts, unless they had previously been authorized to do business within the State.

The network of legislation set up by the California legislature for the protection of its inhabitants may not be evaded by the mere invocation of the Commerce Clause of the Federal Constitution. California's regulatory measures, as applied to the appellant, are of local character and application. Plainly, the appellant was attempting within the territorial boundaries of the State of California, without a license, to solicit and sell insurance of a kind which California, after years of experience, has found wanting in the requirements of safety and security. Such "regulations can not be attacked merely because they affect business activities which are carried on outside the state. Of necessity, any regulation affecting the solvency of those doing an insurance business in a state must have some effect on business practices of the same company outside the state. Nothing in the Constitution requires a state to nullify its own protective standards because an enterprise regulated has its 'headquarters elsewhere.' *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, 320 (1943); see also *State Farm Mutual Auto Ins. Co.* v. *Duel*, 324 U. S. 154, 158 (1945). In the last named case the appellant attacked the constitutionality of a Wisconsin statute which required, as a condition of the right of an in-

surance company to do business in the state, that its reserve be computed by stated percentages of premiums received, including the maintenance of a reserve with respect to policies written in other states. The validity of the statute was upheld, and in the course of the opinion Mr. Justice DOUGLAS said (p. 158):

> "Wisconsin has a legitimate concern with the financial soundness of companies writing insurance contracts with its citizens."

And further (p. 160):

> "As among the several states it is Wisconsin's prerogative to select the appropriate means of protecting its own citizens by establishing financial standards for companies which exploit the opportunities which Wisconsin affords."

(2)

There can be no doubt but that the corporation on whose behalf appellant was acting, could be excluded from doing business within the State. *Asbury Hospital* v. *Cass County*, 66 Sup. Ct. 61 (1945) [not as yet officially reported]. As the Court said in the *Asbury* case (p. 63):

> "The Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it."

Obviously, if foreign corporations may be wholly excluded from doing business in the State, those who seek, within the State, to represent them in the transaction of such business may likewise be prohibited from acting on their behalf. In no other way can the power to exclude be made effective.

In this connection, moreover, it is relevant to note that even as to nonadmitted insurers, provision is made whereby a surplus line broker, operating under a special license,

is enabled to transact business in the state on behalf of such companies. True, this may only be done when the insurance sought cannot be obtained "from a majority of the insurers admitted for the particular class" and "the insurance is not placed in a nonadmitted insurer for the purpose of procuring a rate lower than the lowest rate which will be accepted by any admitted insurer" (Calif. Ins. Code § 1763). But there is nothing to prohibit an applicant and insurer from dealing directly with each other. Thus § 1760 of the California Insurance Code expressly provides that any citizen of the state may "negotiate and effect insurance on his own property with any nonadmitted insurer." The prohibition applies only to agents or brokers acting within the state on the company's behalf.

Nor is it of any consequence that surplus line brokers are subject to different fees and requirements than other agents. The added burden of control and supervision of such brokers on the responsible state officials is amply demonstrated in appellee's brief (pp. 16-18). This furnishes adequate basis for the statutory distinction. It is a firmly established principle that state legislatures have a wide range of discretion in classifying and it is sufficient to satisfy the constitutional requirement that the classification is not palpably arbitrary. *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 562 (1899). Consequently "a statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584 (1935).

(3)

Appellant is not aided by the fact that the company he represents, operating as it does on the assessment plan, could not be admitted to do business in California. The

only companies permitted to operate under that plan are those that were organized or were admitted prior to January 1, 1940, under the applicable statute (Calif. Ins. Code §§ 10810, 10818). California has found from years of experience that companies of the appellant's type, operating without adequate reserves, are unsound, lack financial stability and represent a hazardous investment to the insured (see appellee's brief, pp. 23-37). The California laws under consideration apply equally to domestic and foreign insurers and in no way discriminate against those doing an interstate business. This is a relevant factor in considering whether a state has exceeded the bounds of its power under the Commerce Clause; for "equality of treatment, as between interstate and intrastate commerce, though not conclusive of the fact that interstate commerce is not unconstitutionally interfered with, nevertheless may support a presumption that the State is exercising in good faith its police powers." 2 WILLOUGHBY, *Constitution of the United States* (2d ed. 1929) p. 1006; see also, *South Carolina Highway Dept.* v. *Barnwell Bros.*, *supra*, 303 U. S. 177, 184, n. 2.

(4)

It is argued on behalf of the appellant that his activities do not constitute doing business within the state and consequently no power to regulate such activities exists. We do not subscribe to that view. The testimony plainly showed that the appellant called at the home of a California resident (R. 7, 8); he explained the terms of the policy (R. 8, 20); he filled out the applications, collected and cashed the initial premiums, and furnished a receipt therefor (R. 10, 11, 17, 20). Activities of a lesser degree have been held to justify a holding that business was being transacted within the state. *Pennsylvania Lumbermen's Mutual Fire Ins. Co.* v. *Meyer*, 197 U. S. 407, 414.

415 (1905); *Iowa State Travelling Men's Assn.* v. *Ruge*, 242 Fed. 762, 764, 766 (C. C. A. 8th 1917), *cert. den.* 245 U. S. 657; and see *International Shoe Co.* v. *Washington*, 66 Sup. Ct. 154, 157 (1945) [not as yet officially reported].

Moreover, even had all the formalities for the issuance of the contract of insurance been carried on in the home office of the company, the issue still remains whether California's interests are so affected by the activities within the state as to give California the power it claims. See *Hoopeston Canning Co.* v. *Cullen*, *supra*, 318 U. S. at p. 316. And "the mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn* v. *Ozlin*, *supra*, 310 U. S. 53, 62; see also, *State Farm Mutual Ins. Co.* v. *Duel*, *supra*, 324 U. S. 154, 157-158.

In the *Hoopeston* case, *supra*, Mr. Justice BLACK, in sustaining New York's right to require a foreign insurance company to appoint a resident agent, took a sound view of the problem posed when he wrote (318 U. S. at p. 316):

> "In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors. This interest may be measured by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss."

He continued (p. 319):

> "We conclude that in determining whether insurance business is done within a state for the purpose

of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract, of the degree of interest of the regulating state in the object insured, and of the location of the property insured are separately and collectively of great weight."

Tested by the foregoing considerations, California's right to legislate with respect to appellant's activities within the State can not be seriously questioned. When we consider further the need for supervision of the insurance enterprise, the fact that in the absence of state regulation the numerous phases of that business would remain completely unregulated, plus the long continued and effective systems of control by the states, we have compelling reasons for upholding state regulatory measures of persons and activities within its borders of the type here under attack, by which a state seeks to protect the welfare of its residents.

We now pass on first, to a consideration of the decision in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1945), for the purpose of demonstrating that the principles we have discussed have in no way been disturbed by that decision, and secondly to a discussion of Public Law 15, enacted by Congress in 1945, which in clearest terms authorizes the respective states to regulate the business of insurance.

POINT II

Nothing in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1944), justifies the conclusion that activities of persons within a state, acting on behalf of insurance companies doing an interstate business, may not be subjected to regulation under the state police power; on the contrary, the opinion expressly vouchsafes such right. In any event, Congress, by the enactment in 1945 of Public Law 15, has sanctioned state regulation and completely dispelled any possible basis for appellant's assertions.

A. The decision in United States v. South-Eastern Underwriters Association, 322 U. S. 533 (1944).

Appellant's principal reliance for overthrowing the California statutes involved in this appeal is the decision of this Court in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533 (1944). That case arose out of an indictment of the South-Eastern Underwriters Association and its membership of nearly two hundred fire insurance companies for alleged violations of the Sherman Act (15 U. S. C. §§ 1, 2). The indictment charged the association with two conspiracies: (1) to restrain interstate trade and commerce by fixing premium rates in six named states; and (2) to monopolize trade and commerce in the insurance business among these states.

The defendants demurred to the indictment, claiming that the business of insurance was not commerce and consequently they were not subject to the Sherman Anti-Trust Act. The District Court sustained the demurrer, 51 F. Supp. 712. On a direct appeal to this Court under the Criminal Appeals Act, it was held (by a vote of four to three—two Justices not voting) that the business of

insurance, when it extended across state lines, constituted interstate commerce, and that the Sherman Act was applicable to combinations of insurance companies so engaged in interstate trade. It is on the basis of this holding that appellant argues that the California Insurance laws here involved are violative of the Commerce Clause and invalid.

The decision of the Court in the *South-Eastern* case, as we shall presently demonstrate, does not justify appellant's contention, and the constitutional validity of state laws with regard to matters of local concern has in no way been affected by that decision.

The ruling in the *South-Eastern* case that the business of insurance is commerce was, of course, a departure from numerous previous decisions by this Court. See, *e. g., Paul* v. *Virginia*, 8 Wall. 168, 183 (1869); *Hooper* v. *California*, 155 U. S. 648, 654-655 (1895); *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, 502-504, 510 (1913); *National Union Fire Insurance Co.* v. *Wanberg*, 260 U. S. 71, 75 (1922); *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274, 276-277 (1927). Referring to these cases, Mr. Justice BLACK, writing for the majority, stated (p. 544) that in all of them the attention of the Court "was focused on the validity of state statutes . . . the extent to which the Commerce Clause automatically deprived states of the power to regulate the insurance business." He argued that, since Congress had not legislated to control the business of insurance, "invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint" (*ibid.*).

Departure from the prior holdings was justified, Judge BLACK continued, on the ground that here (p. 545), the Court was not being asked "to uphold another state law,

but to strike down an Act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; * * *." Thus the Justice plainly implied that it was not the intention of the majority to cast into doubt the validity of long continued and needed state regulation in the insurance field. This implication was further strengthened when, in negating the assertion that if insurance be treated as commerce all control is taken from the states and state regulation heretofore sustained must be invalidated, Judge BLACK declared (322 U. S. at p. 548):

> "Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulations. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated."

He concluded with these pertinent words (pp. 548-549):

> "And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid."

Thus the precise holding in the *South-Eastern* case was merely that the Sherman Act applied to illegal com-

binations of insurance companies engaged in interstate activities; and an analysis of the majority opinion clearly supports the view that it was not the Court's intention to question the validity of state regulations of the business of insurance.

It is not without significance that on the same day the *South-Eastern* case was decided this Court also handed down its opinion in *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643 (1945). One of the questions before the Court was whether the activities of the petitioner, a fraternal benefit society, providing death and disability benefits to its members through twenty-seven states, tended "to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" within the meaning of the National Labor Relations Act (29 U. S. C. § 152 [7]). Mr. Justice FRANKFURTER stated (p. 648) that the case presented a "'wholly new problem of the relation of federal authority to the business of insurance.'" Then, after noting that the long series of cases from *Paul* v. *Virginia*, 8 Wall. 168, to *New York Life Insurance Co.* v. *Deer Lodge County*, 231 U. S. 495, have invariably involved resistence under the Commerce Clause to state regulation, Judge FRANKFURTER declared (649):

> "Such was the context in which this Court decided again and again that the making of a contract of insurance is not interstate commerce and that, since the business of insurance is in effect merely a congeries of contracts, the States may, for taxing and diverse other purposes, regulate the making of such contracts and the insurance business free from the limitations imposed upon state action by the Commerce Clause. Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the Constitution or different exertions of power under it. Thus, federal regulation does not preclude state taxation and state taxation does not preclude federal regulation."

It is submitted that the conclusions drawn by the appellant from the *South-Eastern* decision are wholly unwarranted, and that under the principles set forth under Point I (*B*), *supra*, State regulations of the character here challenged are a valid and proper exercise of the State police power. The validity of these laws can come into question only when they should conflict with an Act of Congress, enacted in the exercise of its plenary power over interstate commerce, regulating the same field.

In any event whatever question may possibly have existed as to the validity of such state regulations as the result of the *South-Eastern* decision, has been put completely at rest by the enactment by Congress in 1945 of Public Law 15 (59 Stat. 33, 15 U. S. C. § 1011 *et seq.*).

B. Public Law 15 of 1945.

Subsequent to the decision in the *South-Eastern* case, the Congress of the United States enacted Public Law 15 which became effective March 9, 1945* (59 Stat. 33, 15 U. S. C. § 1011 *et seq.*). By that Act Congress affirmatively approved and authorized the continued regulation of the business of insurance by the respective states.

The purpose of the Act, to use the words of the statute, is to "express the intent of Congress with reference to the regulation of the business of insurance." In plainest terms it sanctions the "continued regulation and taxation by the several States of the business of insurance" and further provides that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States".

Section 2(a) further implements the broad language of the preceding paragraph. Thus it is there provided

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* For the convenience of the Court the full text of Public Law 15 is printed as an appendix to this brief.

that "the business of insurance and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business." Further, under § 2(b) "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." After January 1, 1948, however, the Sherman, Clayton and Federal Trade Commission Acts "shall be applicable to the business of insurance to the extent that such business is not regulated by State law (*ibid.*).

This clear Congressional mandate that "the business of insurance and every person engaged therein" shall be subject to state statutes, forecloses all possible controversy as to the validity of State regulations of the numerous phases of the insurance business. For, "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it." *International Shoe Co.* v. *State of Washington*, 66 Sup. Ct. 154, 158 (1945) [not as yet officially reported]. And see *Southern Pacific Co.* v. *Arizona*, 65 Sup. Ct., 1515 (1945) [not as yet officially reported], where Chief Justice STONE said (pp. 1520-1521):

> "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, * * * or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce."

It is submitted that Public Law 15 is an unequivocal reaffirmation of Congressional policy throughout the years to leave the regulation of the various aspects of the

insurance business to the several states. The Act was unquestionably prompted out of a desire to dispel any possible fears that the *South-Eastern* decision would alter that basic policy. (See House Committee on the Judiciary Report No. 143, February 13, 1945.)* By this enactment Congress clearly manifested its understanding, "that the nature of this subject is not such as to require its exclusive legislation" (*Cooley* v. *Board of Wardens*, 12 How. 299, 319 [1851]). And what was said by the Court in the *Cooley* case in another connection is equally applicable here (*ibid.*):

> "the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."

The vast experience of the states in dealing with the business of insurance and their familiarity with local conditions, has fitted them admirably to deal effectively with the problems in the insurance field, and in a way so as to meet their particular sectional needs and requirements. As Chief Justice STONE observed in his dissenting opinion in *United States* v. *South-Eastern Underwriters Assn.*, *supra*, 322 U. S. at p. 580: "the states have developed extensive and effective means of regulation of the insurance business, often solving regulatory problems of a local character with which it would be impractical or difficult for Congress to deal through the exercise of the commerce power." In a field where supervision is such a vital need, the Courts should not overturn the settled practice of the years, particularly when Congress has plainly spoken.

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*United States Code, Congressional Service (1945 No. 2), pp. 2.14 to 2.17.

Conclusion

Over a period of years the legislatures of the various states, by method of trial and error, have evolved regulatory systems for dealing with the business of insurance in its numerous aspects. Those systems have withstood the test of time and have proved, in the main, entirely effective.

To subscribe to appellant's contention would result, to a great extent, in nullifying salutary legislative provisions, geared to local needs, and designed to promote the security and welfare of the residents of the respective states. At the same time, in view of the complete absence of Federal regulation, it would leave unfettered phases of a business so vitally affected with a public interest. The *South-Eastern* decision requires no such result and, Congress, by the enactment of Public Law 15, has plainly reaffirmed the right of the states to regulate the insurance business.

The constitutionality of the California statutes here challenged should be sustained.

January 4, 1946.

Respectfully submitted,

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Appendix

PUBLIC LAW 15
79TH CONGRESS—1ST SESSION—CHAPTER 20
Approved March 9, 1945

"An Act to express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after January 1, 1948 the Act of July 2, 1890, as amended, known as the Sherman Act and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until January 1, 1948 the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act the term 'State' includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected."